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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-560

BLYTH, EASTMAN DILLON & CO., INC.
and MICHAEL STOTT,
Petitioners,

v.

DAVID E. ROLF,
Respondent,

and

AKIYOSHI YAMADA,
Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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and

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, David E. Rolf, prays that this Court deny the Petition for Certiorari herein (the "petition") for the reasons hereinafter set forth.

Questions Presented

1. Where the question of aider and abettor liability presented for review was not raised below and is not squarely presented on the limited and unique facts of this case, should the petition for certiorari be denied?

2. Where the order sought to be reviewed is interlocutory, and the case has been remanded for further proceedings, should the petition for certiorari be denied?

Statement of the Case

As if writing *Julius Caesar* with a Brutus, but no Cassius, petitioners have attempted to remove Michael Stott from the central role which he played in the fraud perpetrated upon the respondent. Despite the fact that the trial court found Stott "intimately involved" in the management of the doctor's portfolio (App. C 59)*, petitioners, in their fictional drama, have reduced Stott's part to that of a walk-on, with a single line: "I was only an order-taker." (App. C 68)

In fact, however, as the evidence shows, Stott was a principal actor in the fraud. It was to him that the doctor's account was assigned after the death of S. Logan Stirling, a partner at Eastman Dillon who had served as respondent's investment advisor for six years. During that period, Stirling had more than doubled the value of Dr. Rolf's portfolio (App. C 49), increasing it from $400,000 to $1.4 million, by investing in safe, capital growth stocks. Of the 114 stocks purchased by Stirling, 111 were on the American or New York Stock Exchange.** These

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* Appendix C to the petition

** Two of the remaining three securities were warrants of listed companies; the third was on the Pacific Coast Exchange.

investments befitted a doctor who was over sixty years old and had no other retirement nest egg. Indeed, the trial court found, "[s]ince Rolf had no pension or retirement plan, his stocks represented his main security for his later years (Tr. 19)." (App. C 52)

Nevertheless, when asked by respondent to recommend a partner at Eastman Dillon* or an investment advisor, Stott went outside his brokerage house to recommend, not a seasoned analyst of Stirling's stature, but rather a young "whiz kid" who was "committed to special situations," Akiyoshi Yamada. (App. C 46)

Although Dr. Rolf retained Yamada to manage his account, he was troubled by Yamada's youth and inexperience. Respondent therefore, in return for leaving his account at Eastman Dillon, procured the services of Stott "to look after [respondent's] interests." (App. C 52) He instructed Stott that he was to work with Yamada and to supervise the account; above all, every trade was to be made through Eastman Dillon and Michael Stott. Dr. Rolf reiterated these instructions to Stott, stating that respondent needed a man in New York whom he could trust. "[O]n numerous occasions", respondent informed Stott that the respondent was reposing trust in him. (JA 218, 219)**

Unfortunately for Dr. Rolf, Stott was not a man he could trust. Working with Yamada, talking to him daily by phone***, Stott was involved in the decisions which

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* Dr. Rolf testified that he asked Stott to refer him to a partner at Eastman Dillon. Stott, at his deposition, corroborated this testimony, but retracted it at the trial, saying, incorrectly, that partners could not handle discretionary accounts.

** "JA" refers to Joint Appendix submitted to the Court of Appeals.

*** The record establishes that Stott lied at his deposition about the extent of his contact with Yamada. (JA 660) It was subsequently revealed that they had a direct line between their offices and sometimes spoke ten to fifteen times a day. (JA 546)

financially ruined Dr. Rolf. The first such decision was to liquidate the doctor's account. The liquidation as carried out served Stott's interests (commissions)* and those of Yamada (buying power for his manipulations) (App. C 65), but none of Dr. Rolf's. While the doctor had agreed that some conglomerate stocks needed to be sold, what occurred instead was a headlong rush by Stott and Yamada to dispose of every security in the Stirling portfolio. $515,000 worth of securities, mainly blue chips, was sold the very first week. In three and one-half months, the account had been virtually cleaned out; sales totalled $1,844,387.

During this period, despite his lack of discretionary authority, Stott was actively managing Dr. Rolf's account. Through July 1969, the majority of the stocks purchased for respondent were Stott securities, and those sold by Stott to raise cash for such purchases were not the conglomerates which Dr. Rolf had agreed to sell, but instead the more marketable securities rated as "blue chips" by Yamada. Losses stemming from this liquidation totalled $427,000.

Both Stott and Yamada ignored Dr. Rolf's expressed wishes in numerous ways other than the hasty and massive sale of his entire portfolio. Despite emphatic instructions to the contrary, Stott and Yamada purchased securities at brokerage houses other than Eastman Dillon. (App. C 58) One such purchase was made the very first week Stott and Yamada managed the account. Yamada testified that the purchase was designed to pay certain debts incurred by him at Lynch, Jones & Ryan with commission business, and that he had informed Stott of this fact. (JA 386)

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* Yamada testified that one of the factors impelling the liquidation was the "immediate benefit to Mr. Stott of the commissions we derived from the existing portfolio." (JA 380)

Most importantly, however, the nature of the respondent's portfolio was totally changed. Listed, actively traded securities were replaced by "high-fliers" (App. C 68), thinly traded, speculative, over-the-counter and restricted stocks, and a large portion of the portfolio was concentrated in illiquid "lock-ups". Many could not be purchased at Bedco. (JA 402-405) As the trial court stated, there was a "complete transformation of the Rolf account from one containing 23 listed issues of reputable quality to an account made up of the likes of Hair Extension Centers, Health Evaluation Systems, and M. H. Studios . . ." (App. C 85) By the end of August, after Stott and Yamada had managed the account for only three and one-half months, Dr. Rolf's liquid assets had declined almost $1 million, from $1,423,000 to $491,000. It was during this period of tremendous losses that the trial court found Stott was most actively managing the Rolf account. (App. C 57) The court stated:

> "Rolf believed that Stott was intimately involved with the management of the account. Indeed, since Stott and Yamada were in daily contact discussing securities which ended up in the plaintiff's account, Rolf's was a reasonable belief. It was moreover a correct belief; Stott *was* involved with the management of the account." (App. C 59) (Emphasis in original)

Thus, as the trial court found, "[t]he period between May 1969 and January 1970 was characterized by the sale of the listed stocks and the purchase of very different issues." (App. C 59) This marked change in the character of his portfolio alarmed Dr. Rolf. The man he called for advice was Stott. In what has been termed by the trial court as a "hand-holding operation", Stott quieted every worry. When Dr. Rolf complained that purchases were being made in houses other than Eastman Dillon, Stott assured respondent there was no cause for concern, since

"confirmation slips were sent to Stott" and thus "BEDCO could still oversee the account." (App. C 58) When Dr. Rolf complained about the speculative new issues, Stott again reassured him that Yamada knew what he was doing and that respondent would incur no loss. The Stott hand-holding "arrangement" with Yamada (App. C 59) was carried out by Stott despite the fact that he knew Yamada's purchases to be unsuitable for Rolf. The trial court "conclude[d] on this point that Stott did indeed consider many of the securities to be 'junk' and that he told this to Yamada", while at the same time, assuring Rolf, the very opposite. This is not a case where the broker was an unwitting participant in the fraud*, but rather, one in which the broker, motivated by greed**, continued to make repeated false statements, designed to reassure, while the respondent's portfolio was being fraudulently ransacked.

Despite his own opinion as to the securities being purchased for respondent, "Stott never recommended against any purchase." "By continually holding Rolf's hand and assuring him that Yamada's decisions were appropriate" (App. C 89), and by sanctioning the purchase of stocks which he knew to be junk, Stott clearly defrauded respondent, causing the replacement of stocks like Raytheon and

* The Second Circuit made clear that its decision did not extend beyond the limited facts of this case. First, that court held that "Stott's liability is predicated on his contractual involvement in the management of Rolf's account, representing as he did one-half of the 'Stirling-type operation'." (App. A 20) (App. A is Appendix A to the petition). Thus, as the court recognized, Stott specifically agreed to supervise Rolf's account and led him to believe that Stott was carrying out his obligation. In addition, the Court of Appeals stated:

> "This decision does not impose liability on a broker-dealer who merely executes orders for 'unsuitable' securities made by an investment advisor vested with sole discretionary authority to control the account." (App. A 18)

** Stott threatened Yamada that if he didn't give Stott more commission business, he would tell Rolf about the "junk" and would use Stott's "relationship with Rolf" to "have that account pulled from [Yamada] if [he] didn't further cooperate." (JA 407, 408)

Anaconda with those of the ilk of Hair Extension Centers* and International Funeral Services. Thus, the record establishes, Stott was no spectator to the fraud, but an active participant in it. On the phone daily to both Rolf and Yamada, Stott was truly the central figure. By actively buying and selling securities himself, as well as deceiving Dr. Rolf, Stott clearly was a principal in the over-all fraud. Stott was not, as petitioners would have this court believe, merely an order-taker who negligently failed to uncover Yamada's fraud. On the contrary, his "acts" were, the Court of Appeals found, "a substantial causal factor... in the cumulation of Rolf's losses." (App. A 18)

Reasons for Denying the Petition

I.

Petitioners Have Distorted the Record by Misstating Essential Facts.

The instant petition attempts to bring this case within the doctrine enunciated by this Court in *Ernst & Ernst* v. *Hochfelder*.** Petitioners, like Cinderella's step-sisters attempting to force their feet into the glass slipper, consistently portray the action as one involving nothing more than a negligent failure to investigate, thus, struggling to fit the facts of this case into the *Ernst & Ernst* mold. However, since the trial court found, "[u]nlike the usual case brought under the federal securities laws, here it is clear that fraud and breach of fiduciary duty are present," in striving to present a picture of negligence, petitioners necessarily distort the facts and omit to inform the Court of highly relevant evidence. Indeed, were this Court to grant certiorari on the record as described by petitioners, it would later find itself determining a far different controversy than the one which it contemplated.

Petitioners' main distortion results from their attempt to portray Stott as a mere peripheral character in this story

* Stott himself testified that he had laughed about Hair Extension Centers. (JA 687)

** 425 U.S. 185 (1976).

of fraud, rather than the central figure he was. To support this characterization, petitioners have mustered five alleged facts (petition, p. 5), all five of which are either outright misstatements, or so finely shaded as to be tantamount to falsehoods. In order for the Court to understand the nature of Stott's fraud, it is necessary to correct petitioners' errors:

(a) Contrary to petitioners' assertion that "the securities transactions executed in that account were made exclusively at the direction of an independent investment advisor, and not at the direction of Stott or BEDCO," the trial court found that Stott "was intimately involved with the management of [respondent's] account" (App. C 59) and did, indeed, direct and execute orders in such account: "The Court concludes that Stott either recommended or was somehow involved with the decision to purchase ... twelve securities for plaintiff." (App. C 56) Stott admitted recommending six securities, and the trial court found that "Stott himself continually executed purchases and sales in these very stocks for Rolf's account." (App. C 55)

(b) Although petitioners rightly assert that "the investment advisor who directed the account was personally selected by plaintiff", they fail to inform the Court that respondent's choice of Yamada as investment advisor was made upon the recommendation of Stott, which was based, in large part, upon the fact that Stott knew Yamada socially and through business associates with whom he had worked. Respondent had no knowledge of Yamada other than the information supplied him by Stott. Further, as the trial court found, Stott made the recommendation of Yamada without any knowledge of petitioner's account or investment aims. (App. C 50)

(c) While respondent did, as petitioners claim, give Yamada written discretionary authority over his account, the evidence shows that respondent did not intend this to exclude Stott from the decision-making process. The trial court found that respondent wished Stott and Yamada to work together as a team: "Rolf testified repeatedly, and the Court credits the statements, that Rolf sought to balance Yamada's youth and zeal with BEDCO and Stott's reliability and supervision. Indeed, in the plaintiff's mind, by the combination of Stott and Yamada, he was obtaining a 'Stirling-type' operation." (App. C 51) Furthermore, the Court found that Scott and Yamada did, indeed, work together: "While Yamada had the authorization, the Court has found that Stott influenced Yamada's decision making and recommended to Yamada stocks for Rolf." (App. C 78)

(d) Trading losses were not, as petitioners contend, found to have resulted exclusively as a result of Yamada's manipulations. Trading losses in respondent's account were caused by the hasty liquidation of respondent's portfolio and by the purchase of speculative securities grossly unsuitable for him. The court found Yamada's violation of the suitability rule "egregious". These losses are completely independent of Yamada's manipulations. The trial court stated that the "plaintiff has established that the acts of the defendants were a substantial or proximate cause of the placing of unsuitable securities in his BEDCO account . . . and it is clear that plaintiff was damaged as a proximate result of the defendants' fraud." (App. C 92)

This case involves two independent, yet interrelated, frauds which petitioners consistely attempt

to muddle. However, the record establishes that it was the speculative issues, unsuitable for an older person with no retirement plan, which were the primary cause of the losses in respondent's account, and not the manipulations.

(e) Although, the trial court found, Stott did not know the ultimate extent of Yamada's "furtive and fraudulent practices", Stott knew that Yamada's conduct was wrongful. Most importantly, Stott knew that the securities purchased for respondent were highly unsuitable for him. Stott termed them "junk", and told Yamada that petitioner knew they were junk. Yet, in all of the frequent conversations with Dr. Rolf, when he repeatedly questioned Stott about the quality of the securities being purchased in respondent's account, Stott concealed his true opinion, and instead assured respondent that such purchases were proper and safe. "The Court concludes on this point that Stott did indeed consider many of the securities to be 'junk' and that he told this to Yamada. However, it is clear that he never made such a statement to Rolf." (App. C 65) Stott's actions, the court found, "deceived" the respondent and "operated to conceal from Rolf the fraud being perpetrated by Yamada." (App. C 86)

Moreover, the trial court "conclude[d] that plaintiff [had] proved by a preponderance of the evidence that Stott acted with the requisite scienter. . . . This conclusion [was] based upon all the evidence in the case, as well as upon the Court's assessment of Stott's demeanor and credibility." (App. C 87) Included among such evidence was the threat by Stott to reveal to petitioner that Yamada was purchasing junk, unless Yamada increased Stott's commissions. (JA 407, 408)

II.

The Issue of Civil Liability for Aiding and Abetting is Not Squarely Presented by the Unique and Limited Facts of This Case.

The instant petition is based upon the assertion that "[t]his case squarely and directly presents this Court with the legal question of whether or not there is any vicarious civil liability under § 10(b) and Rule 10b-5 promulgated thereunder for 'aiding and abetting' the primary violations of those provisions by a third party. . . ."* Petitioners' basic contention is, however, entirely erroneous. This case not only fails "squarely and directly" to present the court with the question of aider and abettor liability under § 10(b) and Rule 10b-5, but that issue is firmly imbedded in a morass of legal and factual issues, from which, only with difficulty, can it be flushed out. The aider and abettor issue is not squarely presented in this case for at least three reasons, each of which will be separately discussed below.

A. Stott's Aiding And Abetting Involved Misrepresentations Which Themselves Constituted Independent Violations Of § 10(b) and Rule 10b-5.

As respondent will show, under the facts of this case, where the fraud was multi-faceted and the conduct of the defendants was intricately meshed, the necessary attempt to distinguish between primary and secondary violations of § 10(b) on the part of such defendants, may serve to confuse, rather than clarify, the aiding and abetting issue. This case does not present a clear-cut instance of a primary wrongdoer and his assistant. In managing the respondent's portfolio, the petitioner Stott and the defendant Yamada were working in tandem, albeit each toward different ends. Indeed, the trial court stated, both used "very effective methods . . . to shuffle Rolf between the two

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* Petition, p. 9.

of them." (App. C 53) The conduct on the part of Stott, which served to aid and abet the gross fraud of Yamada, involved false representations by Stott which also advanced his own purposes, and constituted in and of themselves separate and independent violations of § 10(b) for which primary liability can and should be imposed. As discussed above, Stott considered many of the securities purchased by Yamada for Rolf to be "junk" and "he told this to Yamada". Nevertheless, despite such knowledge, in order to secure continued commissions, Stott repeatedly assured the elderly respondent, whose investment objectives Stott never ascertained, that such securities were suitable for Rolf's portfolio, and that he would not lose any money as a result of their purchase. (App. C 58, 59) Accordingly, as the trial court found, not only did Stott "never" tell Rolf that the securities being purchased on his behalf were junk, but in addition Stott affirmatively attested to their suitability and strongly sanctioned their purchase. Thus, Stott aided and abetted Yamada's wrongdoing in furtherance of Stott's own ends, by misrepresentations which constituted independent 10(b) violations.

Clearly, Stott was not a passive helper. He was an initiator of the working arrangement with Yamada, having recommended him to Rolf, and Stott was an integral, rather than a peripheral, participant in the over-all scheme. The very complexity of the combined operation makes it difficult, if not impossible, to characterize Stott's conduct as that solely of a secondary violator and never that of a principal, and the evidence establishes that he should be viewed as both.

In *Jones* v. *State Board of Education**, where suit was based upon the suspension of a university student for the distribution of leaflets, the writ of certiorari was dismissed as improvidently granted since it emerged at oral argument and upon a closer review of the record that the petitioner's

* 397 U.S. 31 (1970).

suspension was also based on a finding that he had lied at the hearing on the charges against him. Thus, it was held, the case was rendered "an inappropriate vehicle for this Court's first decision on the extent of First Amendment restrictions upon the power of state universities to expel or indefinitely suspend students for the expression of views alleged to be disruptive of the good order of the campus."* Similarly, in this case Stott's dual role as principal and secondary violator makes this case an inappropriate one for the initial determination of the aider and abettor issue.

B. The Liability Of The Petitioners Was Sustained By The District Court On A Separate Ground, Based Upon The Identical Evidence Which Gave Rise To Aider And Abettor Liability.

Petitioners' liability as determined by the District Court was predicated upon two alternative theories. That court held:

(1) that both petitioners violated § 10(b) and § 15(c)(1) of the Exchange Act and Rules 10b-5 and 15(c)(1-2) thereunder by violations of "N.Y.S.E. Rule 405 and Article III, § 2 of the N.A.S.D. Rules." Such violations sounded in fraud, rather than negligance, and were the result of conduct which "deceived" the respondent and constituted on the part of Stott "a knowing, wilful and reckless disregard for the truth, a callous and knowing disregard for the requirements of the N.Y.S.E. and N.A.S.D. rules involved herein, and proof of the *scienter* requirement by a fair preponderance of the evidence", and

(2) that Stott violated Rule 10b-5 and Rule 15(c)(1-2) as an aider and abettor, and that Bedco, as a controlling person of Stott, was liable for his violations under Section 20 of the Exchange Act and the common law principle of respondent superior. (JA 77)

* *Ibid* at 32.

Thus, the trial court found, the very same conduct on the part of the petitioners gave rise to two independent bases of liability. The finding as to both was challenged by petitioners on their cross-appeal to the Second Circuit. However, that court, having agreed with the court below on aiding and abetting liability, did not reach the question of the related violations of the Exchange Act and Rules thereunder involving wilful transgression of "the N.Y.S.E. rule or the N.A.S.D. constitution." Accordingly, were this Court to grant certiorari, even if it found in favor of the petitioners on the aider and abettor issue, this Court would either be compelled to decide the issue of law left unresolved by the Second Circuit, or face a second petition on this very case.

In *Monrosa* v. *Carbon Black Export, Inc.**, where, based upon the same damage, the respondent brought a libel in admiralty *in rem* against the vessel in question and *in personam* against its owner, this Court granted certiorari to determine whether the libel *in personam* was maintainable. However, after oral argument, this Court concluded that "plaintiff could obtain relief pursuant to libel *in rem*." Accordingly, this Court dismissed the writ of certiorari as improvidently granted, stating that "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation."**

Since in the instant case, the same conduct and the same damage has given rise to two independent causes of action, this case does not present the kind of "meaningful litigation" which this Court has required for the resolution of issues presented to it.

C. Petitioners Did Not Raise The Issue Of Vicarious Liability Below.

Petitioners did not raise below the issue of whether there can be any vicarious liability for damages under

* 359 U.S. 180 (1959).

** 359 U.S. at 184.

§ 10(b) and Rule 10b-5 for aiding and abetting an independent primary violation thereof by a third party. The statement of the issues presented to the Second Circuit for review on petitioners' cross-appeal dealing with aiding and abetting, dealt only with the single question of whether petitioner Stott was, in fact, an aider and abettor:

> "1. Did defendant Stott aid and abet the investment advisor retained by plaintiff in the fraudulent actions of that advisor?"*

In their argument below, the petitioners contended only that there were insufficient findings of fact and evidence to substantiate a determination that the petitioners were aiders and abettors. Thus, petitioners did not challenge any principles of law enunciated by the Second Circuit, or any other court. Rather, petitioners argued that the trial court's interpretation of the evidence adduced at the trial, including its evaluation of the witnesses, was "insufficient as a matter of law to substantiate aider and abettor liability." Thus, the Court of Appeals was not asked to pass upon the issues petitioners now label "important", in the context of the present litigation. Indeed, petitioners raise for the first time in this Court issues which are inextricably bound to the complex facts of the present case. Accordingly, this Court will not have the view of the Second Circuit with respect to the issues presented, as determined under the particular facts and circumstances herein. In addition, as the aider and abettor question raised by the petitioners in the Court of Appeals reflects, the main controversy presented by this petition concerns an evaluation of the facts, with respect to which this Court is being asked to substitute its assessment of the evidence for that of the courts below.

* Petitioners accepted, for purposes of the appeal below, that petitioner BEDCO is chargeable for the acts of its employees by reason of Section 20 of the Securities Exchange Act.

III.

An Interlocutory Order Should Not Be Reviewed Except Under Extraordinary Circumstances Not Present In This Case.

The order sought to be reviewed remands the case to the trial court for the redetermination of damages and a reconsideration of whether pre-judgment interest should be allowed. (App. A 20-23) The damage computation requires the trial court to make additional findings of fact to determine respondent's "gross economic loss", and thereafter, to reduce such loss by the amount of any market decline as measured by a "well recognized" index. The order is interlocutory, as it is plainly not a final judgment.*

The issues of damage and pre-judgment interest ** are important ones to the parties. Indeed, after the trial court's decision awarding damages to respondent of $55,000, the respondent, not petitioners, filed an appeal. Although petitioners filed a cross-appeal, it is clear that had respondent not appealed, petitioners would not have done so either. Thus, this case became in petitioners' eyes, of "wide and far-reaching importance", only when their exposure to damages was enlarged by the Court of Appeals.

Respondent contends that review by this Court should await the resolution of the entire case, as issues yet unresolved, may materially alter its course. Petitioners may be able to establish that they were responsible for only minimal damages to respondent and be content, as they once were, not to contest liability. On the other hand, damages may be assessed at $1.2 million, plus interest of $800,000. In such event, it can be reasonably expected that the damage

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* A judgment is final when it "leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I.M. & S.R. Co.* v. *Southern Exp. Co.*, 108 U.S. 24, 28 (1883).

** Respondent will contend that in periods of inflation, pre-judgment interest should be mandatory, in order to adjust for inflation.

issue will be appealed.* At that time, if this Court so desires, it can determine all issues in a single appeal from a final judgment.

"Finality as a condition of review is an historic characteristic of federal appellate jurisdiction."** This Court has repeatedly stated its reluctance to allow "piece-meal" appeals and has reviewed interlocutory orders only when extraordinary issues are raised or when an immediate review will promote judicial efficiency. This rule was first announced in *American Construction Co.* v. *Jacksonville T. & K. Ry. Co.*:***

> "Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case."

The court explained the reason for its reluctance to review interlocutory orders by stating that such orders often become "unimportant by reason of the final result or of intervening matters."

Similarly, the reasoning behind the reluctance of this Court to review interlocutory appeals was set forth in *United States* v. *Beatty*.† In that case, the United States sought review of an order of the Court of Appeals upholding the right of a landowner to trial by jury in a condem-

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* As one commentator has pointed out, the measure of damages in cases such as the instant one, "is unsettled and the subject of differing, conflicting, and sometimes illogical analysis." Bernstein, *Measuring Damages In Churning And Suitability Cases*, 6 Sec. Reg. L.J. 160, 166 (1978). In *Fey* v. *Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974), the court stated, "the law in this area remains largely unchartered." at 1055, No. 26.

** *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940).

*** 148 U.S. 372 (1893). See *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133 (1913).

† 232 U.S. 463 (1913).

nation case, and vacating an award to the landowner which had been fixed by commissioners. The United States proceeded both by writ of error and certiorari, and asked that the non-final judgment be reviewed upon the latter writ if the former were deemed "premature". This Court held that "[i]t is not intended that these two modes of exercising appellate authority over the circuit courts of appeals . . . shall be coexistent" and that the writ of error "where it exists at all, shall be exclusive." The Court then stated:

> "Whether the 7th Amendment, preserving the right of trial by jury, embraces a proceeding to condemn land for public use, was one of the questions arising for decision in the circuit court of appeals. In deciding it, the court but exercised an undoubted jurisdiction and this whether the decision was right or wrong. If wrong, it was a mere error, and the landowners, having invited it, will not be heard to complain. The jury may award a less compensation than did the commissioners, and if so, the United States will hardly be in a position to complain. Interlocutory rulings not infrequently become of no importance by reason of the final result or of intervening matters, and that may be true here. But if the decision ultimately operates prejudicially to the United States, it can be reviewed, and, if need be, corrected upon a writ of error from the final judgment, as before indicated."

United States v. *Nixon** and *Snyder* v. *Harris*** illustrate the types of cases in which review of non-final orders have been granted. In the former case, review was granted to prevent an unseemly confrontation between the Executive

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* 418 U.S. 692 (1974).

** 394 U.S. 332 (1969).

and Judicial branches which would otherwise have occurred if the issue involved were not determined by this Court prior to a final order. In the latter case, review of an interlocutory order was granted to allow the Court to hear that case along with another case presenting the very same question of law, but based on a final judgment.

The instant case does not involve any extraordinary circumstances, important Constitutional questions or matters of great national significance, justifying review of an interlocutory order, nor will such review promote judicial efficiency. On the contrary, any review at this time may have the effect of "retard[ing]" the ultimate decision "so that the same cause might come before this Court many times before there would be a final judgment."* Such prolongation of the action will work a substantial hardship upon the respondent who was sixty-eight years old at the time of the trial in June of 1976 (App. C 44) and is presently in his seventy-first year. A premature appeal which challenges only one of two grounds of liability and does not include the issue of damages, may prevent respondent from realizing his recovery for many more years. Petitioner is a large investment banking firm, easily able to absorb the expense of protracted litigation. The respondent is a surgeon whose practice will undoubtedly decline with advancing age. The doctor has lost his life's savings through no fault of his own, but rather, as found by the trial court and affirmed on appeal, by the fraudulent conduct of the petitioners. The trial of this case was subject to substantial delays due to calendar conditions in the trial court. Respondent's rightful recovery ought not to be delayed further by allowing a review of an interlocutory order which cannot, no matter how determined, resolve the controversy.

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* *Bank of Columbia* v. *Sweeny*, 26 U.S. (1 Pet.) 567, 569 (1828).

Conclusion

For the reasons set forth above, the Petition for Certiorari should be denied.

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Respectfully submitted

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